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Petition

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81-655

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

A. ROBERT MOOTZ,
Petitioner

V.

KATHERINE MOOTZ,
Respondent

On Writ of Certiorari to the Texas Supreme Court

PETITION FOR CERTIORARI

Thomas C. Railsback
CHARLES H. ROBERTSON, INC.
3016 LTV Tower
Dallas, Texas 75201
214/748-9211

Question Presented

Whether Texas statutes (Articles 1728 and 1821, Vernon's Ann. Civ. St.) which arbitrarily place all divorce litigants in a class and deny that class the equal access to the Texas Supreme Court enjoyed by other, non-classified civil litigants, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and are therefore unconstitutional.

Table of Contents

Question Presented i

Table of Authorities iii

Opinions Below 1

Jurisdictional Grounds 1

Constitutional and Statutory Provisions. 2

Statement of the Case 6

Reasons for Granting Writ. 9

Appendix iv

Certificate of Service vii

TABLE OF AUTHORITIES

Constitutional Provisions	Page
14th Amendment to the United States Constitution	2, 7
Cases	
McCarty v. McCarty, 49 USLW 4850 (1981)	10,11
Mootz v. Mootz, 615 S.W.2d 247 (Tex. Civ. App.--Dallas 1981). . . .	1, 6
Statutes	
28 U.S.C. § 1257 (3)	1
28 U.S.C. § 2403(b)	8
Article 1728, Vernons Ann. Tex. Civ. St.	2, 7
Article 1821, Vernons Ann. Tex. Civ. St.	4, 7

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OCTOBER TERM, 1981

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PETITION FOR CERTIORARI

Opinons Below

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in Mootz v. Mootz, 615 S.W.2d 247 (1981), has no bearing on the federal question and has not been included herein. No opinion was rendered by the Texas Supreme Court.

Jurisdiction

Petitioner's timely Application for Writ of Error to the Texas Supreme Court was dismissed for want of jurisdiction on June 3, 1981. A timely Motion for Rehearing was overruled June 30, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1728 of the Revised Civil Statutes of the State of Texas provides: The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when

same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the State.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive

law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

Article 1821 of the Revised Civil Statutes of the State of Texas provides, in pertinent part:

Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

* * *

All cases of divorce.

* * *

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in

which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728.

Statement of the Case

Mr. Mootz, the Petitioner herein, was respondent in a divorce proceeding before the 254th District Court of Dallas County, Texas, in Cause Number 79-5816-R, in which he appeared and filed his cross-petition. After protracted pretrial proceedings, neither Mr. Mootz nor his counsel below appeared for the scheduled trial of the case, and a "default" judgment was entered against him. Mootz' timely motion for new trial was denied; that denial was upheld on appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, 615 S.W.2d at 247, on the ground that Mootz' motion for new trial was deficient by its failure to meet the standards imposed by Texas case law for a motion for new trial following default judgment.

Mootz filed timely Application for Writ of Error to the Texas Supreme Court, seeking review and clarification of the hopelessly muddled state of Texas law respecting default judgments, raising therein the federal question:

> "The [Texas] Supreme Court has jurisdiction of this suit under Article 1728 of the Revised Civil Statutes. Petitioner would show that all points of error here at issue relate exclusively to default judgment, and the fact that the judgment in question emerged from a divorce action is immaterial. Were this Court to decline jurisdiction on the basis of subdivision 6 of Article 1728, Petitioner would be denied equal protection under the law, inasmuch as he stands before this Court in the same posture as a defendant in any other type of civil suit who has suffered a default judgment." Petitioner's Application for Writ of Error in the Supreme Court of Texas, Cause No. C-303, Statement of Jurisdiction, page 2.

The Texas Supreme Court dismissed Mootz' Application for Writ of Error, without opinion, by order, a copy of which is set out in the Appendix hereto, citing want of jurisdiction.

Mootz again reasserted the federal question in his timely filed motion for rehearing in the Texas Supreme Court:

> "Petitioner would further show the Court that Article 1728 and Article 1821 of the Revised Civil Statutes are both patently unconstitutional on their face and the state statutes as applied to Petitioner violate his rights under the 14th amendment of the United States Constitution."

Petitioner's Motion for Rehearing in the Supreme Court of Texas, Cause No. C-303, page 3.

The Texas Supreme Court overruled Mootz' Motion for Rehearing by order, a copy of which is set out in the Appendix hereto.

Having timely and properly raised the federal constitutional issues at his first opportunity, and their having been passed on by the Texas Supreme Court, Mootz has preserved the issues for review by this Court.

It appearing to Petitioner that 28 U.S.C. § 2403 (b) may be applicable, a copy of this petition has been served upon the Attorney General of the State of Texas.

Reasons for Granting the Writ

Petitioner submits that the arbitrary statutory creation of a class of civil litigants who are denied the same meaningful access to the courts as afforded other civil litigants is an affront to the Equal Protection Clause. Acknowledging that due process does not extend so far as to dress the right to appeal (or to review by a supreme court in a three-tiered hierachy such as exists in Texas) in the impermeable clothes of a fundamental right, Petitioner believes he has been stripped of the protective cloak of equal protection.

The Texas legislature withheld from divorce litigants the judicial remedies enacted to protect other civil litigants, despite the lack of any legitimate, articulated purpose for this class discrimination. Petitioner asserts there is no rational basis for the state statutes, and suggests to this Court that there is no state of facts which

would justify this statutory discrimination.

The importance of this issue must not be overlooked by the Court. Numberless persons are divested of parental and property rights in divorce proceedings, and the relegation of family law to some sort of step-child status is absurd. This Court's recent opinion in McCarty v. McCarty, 49 USLW 4850 (June 26, 1981), creates a situation which clearly reveals the fundamental unfairness of the statutes here under attack.

Needless to say, the McCarty decision has thrown Texas district family law courts into total disarray: are pre-McCarty decrees partitioning military retirement benefits enforceable?; can the district courts consider the value of those benefits to the retiree when partitioning the remainder of the estate?; can the district courts, in cases where military retirement benefit entitlement is the only substantial asset, award a money judgment to the nonretiree spouse to achieve a just and right division of the estate?

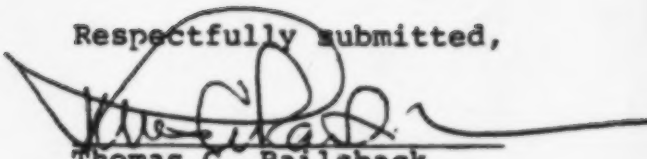
These and other issues emanating from McCarty will doubtless be raised on appeal in the 14 judicial appellate districts in Texas. Under the present state of the law in Texas, none of these questions can advance to the state supreme court for definitive resolution until, question by question, they have been decided differently by sundry of the appellate districts. As a result, there will, without doubt, be a spouse in, say, Dallas, who will be awarded at divorce nothing but whatever personal effects she may have, based on the district and local court's understanding of McCarty, while a spouse in Houston will enjoy a comfortable money judgment payable by the military retiree spouse. By the time there is sufficient appellate dissention to confer jurisdiction on the Texas Supreme Court, years will have passed and it will be too late for the Dallas spouse to seek judicial remedy. Unlike access to the state supreme court, res judicata is as applicable to divorce litigants as it is to other civil litigants.

As the question applies to the case at bar, Mr. Mootz approached the state supreme court in the identical position of any other lower court defendant who had suffered a default judgment. The fact that he was complaining of a divorce judgment was merely incidental and had no bearing whatever on the issue raised. Nevertheless, he was turned away because of Texas' discriminatory statutory judicial scheme. Notwithstanding the fact that he had been divested of virtually all rights, duties and powers of a parent and all right, title and interest to valuable properties, he had no way of securing review by the state supreme court; however, had his plea arisen through a suit involving title to an automobile, for example, he would have had access to the high state court.

The fundamental unfairness is manifest, and Petitioner urges this Court not to ignore this obvious lack of equal protection for which there can be no rational basis.

Petitioner prays the Court grant this petition and review, on writ of certiorari, the question here presented.

Respectfully submitted,



Thomas C. Railsback
Charles H. Robertson, Inc.
3016 LTV Tower
Dallas, Texas 75201
214 748-9211

Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF TEXAS

- - - - - -

No. C-303 June 3, 1981

A. ROBERT MOOTZ)
)
vs.) From Dallas County,
) Fifth District.
KATHERINE MOOTZ)

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Aupreme Judicial District having been duly considered, it is ordered that the application be, and hereby is, dismissed for want of jurisdiction.

It is further ordered that applicant, A. Robert Mootz, and his surety, Lawyers Surety Corporation, pay all costs incurred on this application.

IN THE SUPREME COURT OF TEXAS

No. C-303 June 30, 1981

A. ROBERT MOOTZ)

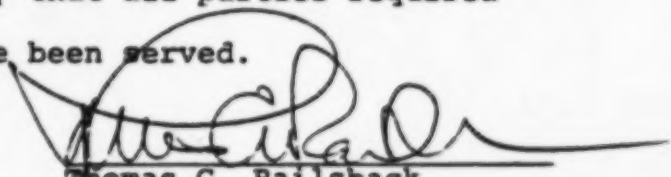
VS.) From Dallas County, Fifth District

KATHERINE MOOTZ)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

Certificate of Service

I hereby certify that on this 28th day of September, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Edmund Burke, 7621 Inwood Road, Dallas, Texas 75209, attorney for Respondent, and three copies were mailed to the Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711. I further certify that all parties required to be served have been served.



Thomas C. Railsback
Charles H. Robertson, Inc.
3016 LTV Tower
Dallas, Texas 75201
214 748-9211

Counsel for Petitioner

Appendix

Supreme Court, U.S.
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No. 81-655

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

A. ROBERT MOOTZ,
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V.

KATHERINE MOOTZ,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI

Thomas C. Railsback
CHARLES H. ROBERTSON, INC.
3016 LTV Tower
Dallas, Texas 75201
214/748-9211

SUPPLEMENTAL APPENDIX

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 20434

A. ROBERT MOOTZ, APPELLANT
VS.
KATHERINE MOOTZ, APPELLEE

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES AKIN, CARVER AND STOREY
OPINION BY JUSTICE CARVER
FEBRUARY 19, 1981

A. Robert Mootz appeals from a divorce judgment granted to his wife Katherine Mootz following a trial at which neither Mootz nor his counsel were present. We affirm because (1) Mr. Mootz's motion for new trial was properly overruled since his motion failed to set up a "meritorious defense," supported by affidavits or other evidence, (2) the evidence was sufficient to support the amount fixed as an attorney's fee, and (3) the trial court may consider "fault" of a spouse in determining a "just and right" division of the estate of the spouses to be made upon the granting of a judgment of divorce.

Mrs. Mootz instituted a suit for divorce in April 1979 on grounds described in her petition as "the marriage between them having become insupportable because of a discord or conflict of personalities that destroys the legitimate ends of the marriage and prevents any further expectation of reconciliation." Mrs. Mootz sought to be named managing conservator of the two children (then ages 15 and 17); sought contribution to the support of the children from Mr. Mootz; and sought a partition of the marital property. Mr. Mootz responded with an answer under oath wherein he (1) denied Mrs. Mootz was a fit or proper person to be named managing conservator of their children, (2) denied that he should contribute to the children's support because he was unable to do so since Mrs. Mootz had interfered with and destroyed his business, (3) denied that he should be required to contribute temporarily to Mrs. Mootz' support or to pay various current debts because he was unable to pay, moreover, Mrs. Mootz was gainfully employed, (4) denied that there was a tax refund

or that it had been wasted or secreted, or that other property had been secreted, and (5) other pleas placing every allegation of Mrs. Mootz' twelve page petition in issue. Some months later Mr. Mootz filed a cross-petition naming Mrs. Mootz and a third party as cross-defendants. Mr. Mootz sought a divorce, sought to be named managing conservator of the children, and sought a "just and right" partition of the marital property, all in the light of Mrs. Mootz' alleged adultery with the third party defendant. The case was set for trial on December 10, 1979, and only Mrs. Mootz and her counsel appeared. Judgment was pronounced that a divorce was granted on Mrs. Mootz' petition, Mrs. Mootz was appointed managing conservator of the children, the property was divided, and Mr. Mootz was assessed a fee of $7,000 for the benefit of Mrs. Mootz' counsel. The judgment was reduced to writing and signed and entered December 17, 1979. On December 21, 1979, Mr. Mootz filed his motion for new trial on the grounds that (1) Mr. Mootz and his counsel's failure to attend the trial was not

the result of conscious indifference but due to accident or mistake in that opposing counsel had stated the case would be reset, and (2) a new hearing would not injure Mrs. Mootz or cause an unreasonable delay. Two attorneys for Mr. Mootz filed affidavits supporting the first ground of the motion and no controverting affidavits were filed. The trial court entered an order overruling the motion for new trial, reciting therein that both parties and their counsel appeared on the motion; however, the statement of facts does not reflect that testimony was offered or taken in the hearing on the motion.

Mr. Mootz appeals arguing (1) that the trial court erred in refusing to grant his motion for new trial, (2) that the evidence was insufficient to support attorney's fees of $7,000, and (3) that the trial [sic] erred in considering "fault" in making a just and right partition of the estate of the parties. We address these particular points as briefed and argued.

Under his first point, Mootz argues that the trial court erred in denying him a new trial since his motion and supporting affidavits were uncontested and conform with the rule announced by the supreme court in Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 338 (1939), 133 S.W.2d 124; and reaffirmed in Ivy v. Carrell, 407 S.W.2d 212 (Tex. 1966). In Ivy the court stated:

> The correct rule, applicable alike to motions for new trial which seek to set aside default judgments entered on failure of a defendant to file an answer and those entered on failure to appear for trial, is stated in Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939), as follows:
>
> > A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the Plaintiff.

407 S.W.2d at 213.

We cannot agree with Mootz because his motion for new trial and supporting affidavits only addressed the first of the two requirements of the "correct" rule, i.e., that the failure of Mootz and his counsel to attend the trial was "not intentional or the result of conscious indifference." Mootz' motion for new trial and the supporting affidavits fail to address the second requirement of the "correct" rule, i.e., "to set up a meritorious defense." In order to set up a meritorious defense, Ivy states: "The motion must allege facts which in law would constitute a defense to the cause of action asserted by the plaintiff, and must be supported by affidavits or other evidence proving prima facie that the defendant has such meritorious defense." 407 S.W.2d at 214. Since Mootz' motion is silent as to facts constituting a meritorious defense, or prima facie proof thereof, the trial court did not abuse its discretion in denying the motion.

By his second point, Mootz urges that the evidence was insufficient to support the amount

of the attorney's fees assessed against him. The statement of facts reflects that counsel for Mrs. Mootz testified that he had devoted 90 to 100 hours in representing Mrs. Mootz, that he had out-of-pocket expenses of $70, and that he had expended $750 in court costs. Further, counsel testified that $60 per hour was a reasonable charge for his services. This testimony is sufficient to support the attorney's fees awarded by the court. See Braswell v. Braswell, 476 S.W.2d 444, 446 (Tex. Civ. App. - Waco 1972, writ dism'd.).

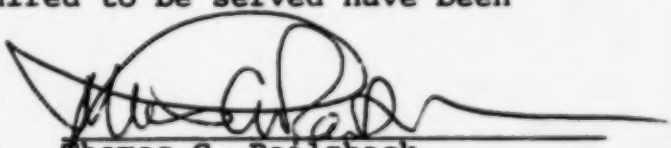
Finally, Mootz urges that the division of the parties' estate was not "just and right" as required by TEX. FAM. CODE ANN. § 3.63 (Vernon 1975) since the trial court considered the "fault" of Mootz in breaking up the marriage. Mootz relies upon Young v. Young, 594 S.W.2d 542 (Tex. Civ. App. - Dallas 1980, writ granted) to support his argument; however, Young was reversed by the supreme court in Young v. Young, 23 Tex. Sup. Ct. J. 119 (December 13, 1980) which held that fault may be considered in dividing community property.

Affirmed.

SPENCER CARVER
ASSOCIATE JUSTICE

Certificate of Service

I hereby certify that on this 9th day of October, 1981, three copies of this Supplemental Appendix to Petition for Certiorari were mailed, postage prepaid, to Edmund Burke, 7621 Inwood Road, Dallas, Texas 75209, attorney for Respondent, and three copies were mailed to the Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711. I further certify that all parties required to be served have been served.



Thomas C. Railsback
Charles H. Robertson, Inc.
3016 LTV Tower
Dallas, Texas 75201
214 748-9211

Counsel for Petitioner